

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PERCY L. BROWN,

Petitioner,

v.

BRYAN D. PHILLIPS, ET AL.,

Respondent.

Case No. 1:23-cv-00629-JLT-HBK (HC)

FINDINGS AND RECOMMENDATIONS TO  
GRANT RESPONDENT'S MOTION TO  
DISMISS<sup>1</sup>

FOURTEEN-DAY OBJECTION PERIOD

(Doc. No. 13)

Petitioner Percy L. Brown ("Petitioner"), a state prisoner, is proceeding pro se on his First Amended Petition for Writ of Habeas Corpus filed under 28 U.S.C. § 2254 on June 12, 2023. (Doc. No. 9, "Petition" or "First Amended Petition"). In response, Respondent filed a Motion to Dismiss on August 9, 2023. (Doc. No. 13). Petitioner did not file an opposition to the Motion to Dismiss and the time to do so has expired. (*See* Doc. No. 10, order directing Respondent to file a response and advising Petitioner that he had 21 days to file an opposition to a motion to dismiss). For the reasons set forth below, the undersigned recommends the district court grant Respondent's Motion to Dismiss and dismiss the First Amended Petition because it does not challenge the fact of length of Petitioner's confinement.

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<sup>1</sup> This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2022).

## I. BACKGROUND

2 Petitioner is serving an indeterminate 17-year to life sentence in the California Substance  
3 Abuse Treatment Facility at Corcoran State Prison for his 2015 conviction for second degree  
4 murder, vehicular manslaughter with gross negligence, and failure to stop at the scene of an  
5 accident resulting in death or injury. (See Doc. No. 9 at 1). According to the First Amended  
6 Petition, on August 2, 2021, a “Counseling Only” Rules Violation Report (“RVR”) was issued to  
7 Petitioner for disobeying an order to return to his assigned section. (Doc. No. 9 at 18). A copy of  
8 the RVR attached to the Petition indicates that Petitioner was given a verbal counseling for  
9 disobeying orders, after which he became aggressive and was escorted out of the building. (*Id.*).  
10 Petitioner claims he was leaning on his walking cane for five minutes because he was in pain and  
11 correctional officers refused to allow him in his “section,” he was handed mail by another inmate  
12 who asked him to place the slip in the box next to the entrance, and when Petitioner complied  
13 with that request an argument ensued between Petitioner and a correctional officer. (*Id.* at 7-8).

14 Petitioner raises the following claims in his First Amended Petition: (1) “retaliation to free  
15 speech for disability discrimination and denial of direct evidence video”; and (2) violation of  
16 Petitioner’s due process rights “effect[ing] eligibility for parole.” (*Id.* at 4, 12-15). As relief,  
17 Petitioner asks the Court to vacate and expunge the Counseling Only RVR dated August 2, 2021.  
18 (*Id.* at 15). In response, Respondent moves to dismiss the Petition for lack of federal habeas  
19 jurisdiction. (Doc. No. 13). Specifically, Respondent argues that success on the Petition would  
20 not affect the duration of Petitioner’s confinement. (*Id.* at 2). As noted *supra*, Petitioner did not  
21 file a response to the motion to dismiss, nor request an extension of time to respond, and the time  
22 for doing so has expired.

## II. APPLICABLE LAW AND ANALYSIS

Under Rule 4, if a petition is not dismissed at screening, the judge “must order the respondent to file an answer, motion, or other response” to the petition. R. Governing 2254 Cases 4. The Advisory Committee Notes to Rule 4 state that “the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by respondent.” A motion to dismiss a petition for writ of habeas corpus is construed as a request for the court to

1 dismiss under Rule 4 of the Rules Governing Section 2254 Cases. *O'Bremski v. Maass*, 915 F.2d  
2 418, 420 (9th Cir. 1990). Under Rule 4, a district court must dismiss a habeas petition if it  
3 “plainly appears” that the petitioner is not entitled to relief. *See Valdez v. Montgomery*, 918 F.3d  
4 687, 693 (9th Cir. 2019); *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).

5 “The habeas statute unambiguously provides that a federal court may issue a writ of  
6 habeas corpus to a state prisoner ‘only on the ground that he is in custody in violation of the  
7 Constitution or laws or treaties of the United States.’” *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010)  
8 (per curiam) (quoting 28 U.S.C. § 2254(a)). If a prisoner’s claim “would necessarily demonstrate  
9 the invalidity of confinement or its duration,” a habeas petition is the appropriate avenue for the  
10 claim. *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). In contrast, if a favorable judgment for the  
11 petitioner would not “necessarily lead to his immediate or earlier release from confinement,” he  
12 may assert his claim only under 42 U.S.C. § 1983. *Nettles v. Grounds*, 830 F.3d 922, 935 (9th  
13 Cir. 2016). In *Nettles*, the Ninth Circuit, in analyzing Supreme Court precedent distinguishing  
14 relief available via § 1983 or habeas corpus, concluded if a state prisoner’s claim does not lie at  
15 “the core of habeas corpus,” meaning where success on a claim would not necessarily lead to an  
16 immediate or speedier release, then the claim “may not be brought in habeas corpus but must be  
17 brought, ‘if at all,’ under § 1983.” *Id.* at 931 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 487  
18 (1973); 93 S. Ct. 1827 (1973); *Skinner v. Switzer*, 562 U.S. 523, 535 (2011)).

19 **1. Claim not Cognizable Under *Nettles***

20 Initially, Petitioner does not assert that he lost any good time credits as a result of the  
21 RVR. (See Doc. No. 9). As noted by Respondent, a Counseling RVR does not result in the loss  
22 of credits. (Doc. No. 13 at 2-3 (citing Cal. Code Regs. tit. 15, § 3312) (Counseling Only RVR  
23 issued when “minor misconduct recurs after verbal counseling or if documentation of minor  
24 misconduct is needed.”)). Significant here is that Petitioner is serving an indeterminate life  
25 sentence with the possibility of parole. Thus, even if the Counseling Only RVR was to be  
26 expunged from Petitioner’s record as he requests, it would not necessarily lead to a grant of  
27 parole because under California law the parole board must consider all relevant reliable  
28 information in determining suitability for parole, and “has the authority to deny parole on the

1 basis of any grounds presently available to it.” *Nettles*, 830 F.3d at 935 (citing *Ramirez v.*  
2 *Galaza*, 334 F.3d 850, 859 (9th Cir. 2003)). Because success on neither of Petitioner’s claims  
3 would not necessarily lead to his immediate or earlier release from confinement, they do not fall  
4 within “the core of habeas corpus,” and are not cognizable in federal habeas corpus. *See id.*; *see also Martinez v. Sec’y of Cal. Dep’t of Corr. & Rehab.*, 2022 WL 3129136, at \*1 (E.D. Cal. July  
5 26, 2022) (finding petitioner’s claim based on issuance of a counseling only RVR did not result in  
6 credit loss and was therefore not cognizable in federal habeas corpus).

7

8 **2. Conversion to § 1983 Civil Rights Action**

9 Although on the preapproved § 2254 form, Petitioner does not challenge either the fact or  
10 length of his confinement. *See Badea v. Cox*, 931 F. 2d 573, 574 (9th Cir. 1991) (noting purpose  
11 of habeas is to challenge “legality or duration” of a petitioner’s incarceration, quoting *Preiser v.*  
12 *Rodriguez*, 411 U.S. 475, 485 (1973)). Instead, the Petition alleges civil rights violations,  
13 specially a First Amendment violation and Fourteenth Amendment violation, which are properly  
14 challenged in a civil rights action under 42 U.S.C. § 1983. *See Preiser*, 411 U.S. at 499. While  
15 the court has discretion to construe a habeas petition as a civil rights action under § 1983, such  
16 recharacterization is appropriate only if it is “amenable to conversion on its face, meaning that it  
17 names the correct defendants and seeks the correct relief.” *Nettles*, 830 F.3d at 936 (quoting  
18 *Glaus v. Anderson*, 408 F.3d 382, 388 (7th Cir. 2005)).

19 The undersigned does not recommend recharacterization in this case. Petitioner does not  
20 seek monetary damages; rather, as discussed *supra*, the only remedy sought is expungement of  
21 the Counseling Only RVR due to its presumed effect on Petitioner’s eligibility for parole.  
22 Moreover, automatic conversion is improper due to the discrepancy in filing fees. In granting  
23 Petitioner *in forma pauperis* status, the Court waived the \$5.00 filing fee for a habeas corpus  
24 action, as opposed to the \$350.00 filing fee that is payable over time and applicable to prisoners  
25 prosecuting a civil rights action. In addition, if a civil rights complaint is dismissed as malicious,  
26 frivolous, or for failure to state a claim upon which relief can be granted, that dismissal can count  
27 as a “strike” against the prisoner plaintiff under 28 U.S.C. § 1915(g), which could impair  
28 Plaintiff’s ability to bring civil rights claims in the future. Due to these differences and the

1 disadvantages that recharacterization may have on Petitioner's claims, the undersigned finds that  
2 it would be inappropriate automatically to convert the habeas petition as a civil rights complaint  
3 under 42 U.S.C. § 1983. This conclusion, however, does not preclude Petitioner from pursuing  
4 his claims in a properly filed civil action pursuant to § 1983 should he so choose.

5 Accordingly, the undersigned recommends the Petition be dismissed for lack of federal  
6 habeas jurisdiction.

7 **III. CERTIFICATE OF APPEALABILITY**

8 State prisoners in a habeas corpus action under § 2254 do not have an automatic right to  
9 appeal a final order. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36  
10 (2003). To appeal, a prisoner must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(2);  
11 *see also* R. Governing Section 2254 Cases 11 (requires a district court to issue or deny a  
12 certificate of appealability when entering a final order adverse to a petitioner); Ninth Circuit Rule  
13 22-1(a); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). Where, as here, the court  
14 denies habeas relief on procedural grounds without reaching the merits of the underlying  
15 constitutional claims, the court should issue a certificate of appealability only “if jurists of reason  
16 would find it debatable whether the petition states a valid claim of the denial of a constitutional  
17 right and that jurists of reason would find it debatable whether the district court was correct in its  
18 procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “Where a plain procedural bar  
19 is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist  
20 could not conclude either that the district court erred in dismissing the petition or that the  
21 petitioner should be allowed to proceed further.” *Id.* Here, reasonable jurists would not find the  
22 undersigned’s conclusion debatable or conclude that petitioner should proceed further. The  
23 undersigned therefore recommends that a certificate of appealability not issue.

24 Accordingly, it is **RECOMMENDED**:

25 1. Respondent’s Motion to Dismiss (Doc. No. 13) be **GRANTED**.  
26 2. The First Amended Petition (Doc No. 9) be dismissed for lack of federal habeas  
27 jurisdiction.  
28 3. Petitioner be denied a certificate of appealability.

1                   4. The Clerk of Court be directed to send Petitioner a blank civil rights complaint form.

2                   **NOTICE TO PARTIES**

3                   These findings and recommendations will be submitted to the United States district judge  
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14) days  
5 after being served with these findings and recommendations, a party may file written objections  
6 with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and  
7 Recommendations.” Parties are advised that failure to file objections within the specified time may  
8 result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014)  
9 (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

10  
11                   Dated: November 1, 2023

  
12                   HELENA M. BARCH-KUCHTA  
13                   UNITED STATES MAGISTRATE JUDGE